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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----X

3 ADRIANA AGUILAR, et al,

4 Plaintiffs,

5 v.

07 CV 8224 (JGK)

6 BUREAU OF IMMIGRATION AND  
7 CUSTOMS ENFORCEMENT,

8 Defendant.

-----X

9 New York, N.Y.  
10 October 5, 2007  
3:25 p.m.

11 Before:

12 HON. JOHN G. KOELTL,

13 District Judge

14 APPEARANCES

15 DEWEY & LEBOUF  
16 Attorneys for Plaintiff  
DONNA L. GORDON

17 PUERTO RICAN LEGAL DEFENSE AND EDUCATIO FUND  
18 Attorneys for Plaintiff  
FOSTER MAER

19 UNITED STATES DEPARTMENT OF JUSTICE  
20 Attorneys for Defendant  
ELIZABETH WOLFSTEIN  
SHANE CARGO  
21 PATRICIA BUCHANAN

7a5QaguC

1 (In open court; case called)

2 MS. GORDON: Donna Gordon of Dewey & Leboeuf for  
3 plaintiffs.

4 MR. MAER: Foster Maer of the Puerto Rican Legal  
5 Defense and Education Fund for plaintiffs.

6 MS. SCHWARTZ: Ghita Schwartz of the Puerto Rican  
7 Legal Defense and Education Fund for plaintiffs.

8 MS. WOLFSTEIN: Elizabeth Wolfstein from the U.S.  
9 Attorney's office for the defendants.

10 MR. CARGO: Shane Cargo also from the U.S. Attorney's  
11 office for the defendants.

12 MS. BUCHANAN: Patricia Buchanan, also from the U.S.  
13 Attorney's office for defendants.

14 THE COURT: Good afternoon, all. I expect that I know  
15 people at Dewey & Leboeuf. There's nothing about anything that  
16 affects anything that I do. I know people at the U.S.  
17 Attorney's Office, and there's nothing about that that affects  
18 anything that I do. This is a order to show cause for a  
19 temporary restraining order and expedited discovery. It's an  
20 unusual temporary restraining order because it doesn't ask me  
21 to set down a date for a preliminary injunction, and, of  
22 course, on its face a temporary restraining order is only good  
23 for ten days and usually comes with a request for a hearing on  
24 the preliminary injunction, but I will listen to the parties.

25 MR. MAER: Thank you, your Honor. If I may go to the

7a5QaguC

1 podium.

2 THE COURT: Sure.

3 MR. MAER: My name is Foster Maer of the Puerto Rican  
4 Legal Defense and Education Fund speaking for plaintiffs. To  
5 address your point, typically a request for a preliminary  
6 injunction is attached to the temporary restraining order. We  
7 talked about going that way or this way, which we thought was a  
8 little more appropriate since we know so little about the facts  
9 behind defendant's actions here. So we thought it a bit more  
10 judicious, but obviously we would make any timely motion for  
11 the preliminary injunction to make sure that our clients are  
12 protected and that the normal procedures are followed.

13 So, if your Honor believes that we should amend that  
14 or in a sense file the preliminary injunction sooner rather  
15 than later, we will do so. We filed this complaint two weeks  
16 ago alleging that under the pretension of seeking certain  
17 fugitive aliens that the defendants have engaged in a pattern  
18 and practice of entering and searching the homes of Latino  
19 households in the Downstate New York area without either a  
20 search warrant, valid consent or exigent circumstances.

21 Two examples make this clear. The Aguilar Norman  
22 family. On February 20, armed ICE agents pounded on the door  
23 of their home in East Hampton, New York between 4:30 and  
24 5:00 a.m. in the morning. After a Spanish-speaking grandmother  
25 opened the door, they pushed passed her, raced down the stairs,

7a5QaguC

1 opened all the bedroom doors, pulled off all the bed covers,  
2 shined flashlights in everybody's eyes who was asleep there,  
3 including a nine-year-old and a four-year-old, I believe --  
4 12-year-old and four-year-old children who were completely  
5 terrified by everything that went on there. They proceeded to  
6 search the premises. They detained the people there in the  
7 house and interrogated them. What is particularly striking  
8 about this case is they were looking for Ms. Aguilar's  
9 ex-husband who had been divorced -- they had divorced five  
10 years ago. He had never lived in this house. How they came to  
11 believe he did, we don't know, but obviously any simple sort of  
12 investigative technique would have revealed that he did not  
13 live there. Last point, they said they might return. Since  
14 then, the Aguilar Norman family, particularly the children, are  
15 terrified that the ICE agents will return.

16 The other example is the Doe family. In the winter of  
17 2007, again armed ICE agents pound on the door around 5:00 in  
18 the morning. The Does heard what sounded like them breaking  
19 down the entrance door to this two-family home and then  
20 breaking down the door to the first floor unit, taking away  
21 somebody. They saw somebody being taken away into a van who  
22 they believed, from what was being said, was the person that  
23 was being looked for. Then after they'd done that, they come  
24 upstairs and pound on the door, try to get their way in, even  
25 though, again, they found the person they were looking for.

7a5QaguC

1 Fortunately, the locks held, they did not get in, but, again,  
2 this family is left terrified that ICE will return.

3 After filing our complaint, what happens next? The  
4 local regional office conducts another series of raids, this  
5 time much more extensive and much more brutal; but, again, the  
6 same pattern. If someone opens the door, the ICE agents push  
7 their way in without obtaining consent. If no one opens the  
8 door, they try to break it down. Once inside, the ICE agents  
9 proceed to act in ways that result in the residents being  
10 terrified.

11 Two examples, the Elder Bonilla and Dana Rodriguez  
12 family in Westbury, an extended family, September 24 last week,  
13 they were awakened by armed ICE agents pounding on the door,  
14 shouting outside their door. Elder went to the front door, saw  
15 through the window the law enforcement agents outside. The  
16 agents screaming "open the door, open the door". So when he  
17 did, three agents burst into the home. One of them pointed a  
18 gun to his chest. He was handcuffed and pushed onto the sofa  
19 in the living room. They then stormed through the home and  
20 began searching throughout the bedrooms throughout the house.

21 Upstairs they handcuffed Diana Rodriguez, Elder's  
22 fiance, and forced her downstairs leaving their 15-month-old  
23 child upstairs crying in the bedroom. The other examples,  
24 Sonia Bonilla and her 12-year-old daughter, Beatriz Velasquez,  
25 and 9-year-old Dalia Velasquez, all plaintiffs, that same day

7a5QaguC

1 the 12-year-old, Beatriz, opened the door after she had been  
2 startled awake from the ICE agents who again were pounding  
3 violently on the door yelling "police, police". Her parents  
4 weren't home because the wife was dropping the father off at  
5 work. Beatriz opened the door, was confronted by four ICE  
6 agents who forced their way past her into the home. They  
7 proceeded to interrogate Beatriz, again, a 12-year-old and  
8 eventually ordered her and her younger daughter into the  
9 bedroom. There they could hear the agents storming through the  
10 rest of the house shouting, banging on bedroom doors, entering  
11 the rooms of the family tenants and separating a father from  
12 his four-month-old infant. When the infant began to cry, they  
13 could hear the agents -- when the father asked the agents if he  
14 could leave the infant with the two sisters downstairs, the  
15 agents refused, abandoning the infant alone in the bedroom.  
16 This family was in terror that ICE will return.

17 All of these families have lawful status. None of  
18 them are gang members. As far as we know, except for the  
19 ex-husband of Ms. Aguilar, there is no reason that they know of  
20 why their homes were raided, and they'd never heard of the  
21 alleged target of these raids. Of course, they were not shown  
22 a warrant, a single warrant for any of these entries.

23 These are terrifying stories. Could they be a bit  
24 enhanced because, gee, these are early morning, scary raids?  
25 Unfortunately, no, as verified by Nassau County Police, the

7a5QaguC

1 police chief and the county executive. Attached to our motion  
2 papers, exhibit 1, are the letters issued just three days ago  
3 about these raids. In that letter they set out that they are  
4 making "serious" allegations of misconduct, malfeasance and  
5 they made two general complaints. First, that these raids  
6 lacked current intell; that ICE did not have adequate  
7 information where these alleged gang members were, which was  
8 allegedly what the reason for these raids was. Only 9 of the  
9 82 arrests made last week in Nassau County were of gang  
10 members. Everyone else had no association with a gang. The  
11 intell was so bad that they were relying on a picture of a  
12 29-year-old from when he was seven when they were trying to  
13 identify him. In short, they were busting down the wrong  
14 houses.

15 Second, and I don't know which is more disturbing,  
16 they asserted that "tactically" the operations was poorly  
17 structured and that they used border patrol personnel from  
18 across the country who had not trained together for this  
19 complex mission. Most disturbing, it goes on to say ICE  
20 members wore cowboy hats and in the view of some members  
21 displayed a cowboy mentality. Again, this is from the county  
22 executive, in my view posed unnecessary danger to all parties,  
23 including my members who in fact were drawn upon by some of the  
24 ICE agents.

25 So even the police accompanying the ICE agents were



7a5QaguC

1 terrified of what was going on, felt in danger, and had guns  
2 pulled on them.

3 Tragically, these raids have continued. Yesterday -  
4 we have not been able to speak to the family - we heard of  
5 another raid in Queens. This time where it was a three-bedroom  
6 apartment where they entered the building without consent, the  
7 different apartments without consent, looking for someone who  
8 had lived in the building seven years ago; again, making  
9 numerous arrests but not of the person they were looking for.

10 So, why is this going on now? 2003 defendant ICE  
11 announced its intention to step up its activities in locating  
12 and deporting what are called fugitive aliens, immigrants who  
13 do not have lawful status against whom there is an order of  
14 deportation. Initially ICE focused only on those fugitive  
15 aliens against whom there was a criminal conviction.

16 In 2006 that changed, and that's what we think has  
17 changed the dynamic of what's going on here. They expanded the  
18 focus to target any fugitive alien. It didn't matter whether  
19 they had any criminal contact. Simultaneously, they increased  
20 the arrest quota for each team within ICE, these fugitive  
21 operation teams, from 125 arrests per year to 1,000, an  
22 800 percent increase. To satisfy this heavy quota set by ICE  
23 management, these teams had responded to obviously, (1)  
24 increasing the number of raids, which, again, very much could  
25 lead to the likelihood of knocking on the wrong door; and (2)



7a5QaguC

1 by focusing on arresting people or counting on arresting people  
2 who were not the fugitive alien but were in these residence  
3 when they made these raids.

4 In that context, it would make sense, since this is  
5 really a new initiative of entering homes at night, maybe to  
6 develop some protocol, some rules for how these raids are to be  
7 conducted. They have them for work place raids, but they don't  
8 have them, as far as we know, for these home raids. So you  
9 have this massive pressure for arrest quotas and no rules  
10 governing how these raids are to be conducted.

11 Given that combination, it's hardly surprising that  
12 ICE agents have failed to comply with the Fourth Amendment  
13 guarantees against unreasonable searches. So we come to court  
14 today with this order to show cause seeking three forms of  
15 relief: (1) a stay of any further home raids, unless there's a  
16 judicial warrant to search the home; (2) that plaintiffs will  
17 step forward here, and they do so with great fear. This is one  
18 of the problems why we think these practices have gone on for  
19 as long as they have, is that the immigrant community, these  
20 families that are raided are terrified of stepping forward and  
21 publicly challenging ICE's activities because typically they  
22 have relatives and family who are dependent on ICE and are  
23 trying to get lawful status here. So we ask they be protected  
24 from any type of retaliation, deportation, arrest, visiting  
25 the home, etc.; (3) to preserve the ability of counsel to

7a5QaguC

1 interview the victims of this raid, we ask that all -- to  
2 identify all the people who have been arrested since  
3 September 20 the day we filed the complaint, that if they're  
4 currently in New York State or the New York region, that they  
5 stay here, so that we do have the opportunity to interview them  
6 and potentially use them as witnesses.

7 We also ask that, as indicated before, that we get  
8 discovery on an expedited basis so that we can learn what, from  
9 ICE's point of view, is going on here. In particular, we would  
10 like to see these alleged administrative arrest warrants, who  
11 they are for, and why they chose these homes. We obviously  
12 want the basic information of how many raids have been  
13 conducted. Very simple, straightforward information.

14 And, last, do they have rules, and what do these rules  
15 say? All we are aware of is a couple of paragraphs in one  
16 manual that describes or that essentially concludes that it's  
17 the totality of the circumstances. And how is a -- not that  
18 law school necessarily teaches you everything, but an agent,  
19 how are they to know really what the totality of circumstances  
20 are? They need to know what it takes to get consent to go into  
21 a home. If you knock on the door and someone opens it, can you  
22 just push on by? Can you step in? If they invite you in, can  
23 you go and take over the whole house or do you have to stay in  
24 that room? These rules are established by case law, but they  
25 are not communicated to these agents.

7a5QaguC

1 In sum, I point back again to the letters from Nassau  
2 County that have determined that not only are their police  
3 agents, but our clients, the people who live in these homes,  
4 are in danger, physical danger from these raids. We ask that  
5 the residents of these homes be given the same protection  
6 that's being given to the police force members; that these  
7 raids be stopped unless there's a judicial warrant. The  
8 government will be able to continue to get home raids. They  
9 just have to do their homework like every other police agency,  
10 and they can still arrest individuals on the street or what  
11 have you. They just can't go into somebody's home. So we  
12 think that this is appropriately crafted relief. ICE can still  
13 do its job, but our clients are protected from this clear  
14 danger. Thank you, your Honor

15 THE COURT: All right. The government?

16 MS. WOLFSTEIN: Thank you, your Honor. We are here on  
17 a temporary restraining order, of course. I will address some  
18 of the factual background and the irreparable harm issue, and  
19 my colleague, Shane Cargo, will address the success of  
20 likelihood on the merits. I would just note that we have not,  
21 in fact, received a copy of the amended complaint. We looked  
22 on the Court's website earlier today and couldn't find it there  
23 either. So our comments are addressed to the motion rather  
24 than the complaint.

25 THE COURT: The amended complaint was not served with

7a5QaguC

1 the papers given to the court either.

2 MS. GORDON: Excuse me, your Honor. The amended  
3 complaint was filed yesterday with the clerk.

4 THE COURT: OK. I wasn't given it with the papers on  
5 the order to show cause.

6 MS. GORDON: We can get you a copy.

7 THE COURT: Thank you.

8 MS. WOLFSTEIN: Your Honor, the enforcement program  
9 being challenged in the complaint targets fugitive aliens who  
10 have been ordered to leave the country under final orders of  
11 removal but who have not done so. What it means for an alien  
12 to be under a final order of removal is that he's had a hearing  
13 before an immigration judge, he's had the opportunity to appeal  
14 an adverse decision to the board of immigration appeals, and  
15 he's had an opportunity to appeal an adverse decision of the  
16 BIA to the Court of Appeals. In all of these proceedings from  
17 the IJ on up to the Court of Appeals, the alien has the  
18 opportunity to raise any and all claims he may have that  
19 challenges the government's charges that he is subject to  
20 removal. That includes constitutional claims as well as any  
21 other basis the alien has for seeking relief from the removal  
22 order.

23 So, the fact that someone is under a final order of  
24 removal means that the person has gone through all of that  
25 process, but three tribunals: The IJ, the BIA, and the Court

7a5QaguC

1 of Appeals have found that the alien is not entitled to relief  
2 from removal.

3 Once a final order of removal is issued, ICE, the  
4 Immigration and Customs Enforcement, is entitled to execute it  
5 by deporting the alien without further process. What this  
6 operation sought to do -- I'm talking about the operation  
7 that's detailed in the original complaint. The operation  
8 regarding gang members is a different operation. But what this  
9 operation that's discussed in the original complaint sought to  
10 do is seek out these aliens under final orders of removal, and  
11 to do that by using the best available investigative  
12 information; and if the information led to a house, the agents  
13 would go to the house and knock on the door of the house and  
14 seek consent to enter and look for the alien.

15 So this is a program that rests entirely on consent.  
16 The government is not claiming that we have probable cause to  
17 search. What there is is an absolute entitlement to execute  
18 the order of removal. Just to give an example of the Aguilar  
19 family, the person sought, the ex-husband, had been under a  
20 final order of removal since 1998, so nine years, and was also  
21 a criminal alien who had committed a crime.

22 Turning to the TRO, of course a TRO is an  
23 extraordinary remedy that is meant to preserve the status quo  
24 and prevent irreparable harm until an underlying motion for  
25 injunctive relief can be resolved. If we look beneath some of

7a5QaguC

1 the heated rhetoric here, we can see this is simply not a case  
2 that merits this kind of extraordinary relief.

3 The required showing of irreparable harm and the  
4 likelihood of success on the merits is effectively a standard  
5 that applies in cases of preliminary injunction. Now, as an  
6 initial matter, a standard for preliminary injunction that  
7 applies here is a heightened one for two reasons.

8 One is because we're talking about a program challenge  
9 that is government action taken in the public interest pursuant  
10 to a statutory or regulatory scheme. When that is the case,  
11 the standard is likelihood of success on the merits, that's  
12 what the plaintiff has to show; not fair ground for litigation,  
13 the lesser standard.

14 Second, we're also talking about a mandatory  
15 injunction as opposed to a prohibitory injunction. It's a  
16 mandatory injunction because it would alter the status quo by  
17 dramatically changing the government's operation from one that  
18 proceeds on consent to one in which the government would be  
19 required to obtain a warrant based on a showing of probable  
20 cause.

21 Now, for a mandatory injunction, the moving party is  
22 required to meet still more heightened showing on the merits;  
23 that is, a clear or substantial showing of a likelihood of  
24 success on the merits.

25 Now, as Mr. Cargo will explain in further detail, the

7a5QaguC

1 plaintiffs cannot meet this standard, first, because they lack  
2 standing under the case of *City of Los Angeles v. Lyons* which  
3 is a case from the Supreme Court that addresses standing in the  
4 exact scenario we have here, ie., a past constitutional  
5 violation and a request for an injunction against an ongoing  
6 law enforcement program. We have copies of that case for the  
7 Court and for counsel.

8 But for similar reasons, they also cannot show an  
9 entitlement to equitable relief because they do have an  
10 adequate damages remedy in the form of a Bivens claim which  
11 they're certainly availing themselves of here.

12 On to irreparable harm in the absence of injunction,  
13 the plaintiffs have not shown that there's any likelihood of a  
14 concrete, nonspeculative harm much less one that is  
15 irreparable. Now, the claimed harm, you heard counsel say it,  
16 is that the plaintiffs are terrified that ICE will return.  
17 Having been legitimately the victims of an unconstitutional  
18 victim in the past, they're afraid that it will happen to them  
19 again. And, again, the sole basis for thinking so is that  
20 there has been allegedly unconstitutional entry into the house  
21 in the past.

22 Your Honor, the fact that there has been a past  
23 violation, even assuming that that's true, says nothing about  
24 whether ICE agents will return to these plaintiffs' homes and  
25 commit unconstitutional acts. That is what the Supreme Court



7a5QaguC

1 said in City of Los Angeles; namely, that just because your  
2 rights have been violated in the past does not mean that there  
3 is any likelihood that the experience will be repeated in the  
4 future.

5 The plaintiffs cite several cases in their brief  
6 alleging a constitutional violation in the context of a  
7 preliminary injunction satisfies the irreparable harm standard.  
8 We need to look at those cases because those claimed violations  
9 are quite different. They are in fact ongoing violations or  
10 they're violations that it's apparent the plaintiff would  
11 likely or conceivably or possibly be subjected to. In the  
12 Jolly case, that's the case where the inmate refused a TB test  
13 on religious grounds and was placed in administrative  
14 detention. That violation was ongoing. He remained in  
15 administrative detention. So that's an example of the ongoing  
16 violation.

17 In the other two cases, *Mitchell v. Cuomo* that was the  
18 case where the state wanted to close a certain prison which  
19 undeniably would have resulted in the transfer of the  
20 plaintiffs to another overcrowded prison. And absent an  
21 injunction forbidding the closing of the prison, their Eighth  
22 Amendment rights would have been violated because they would  
23 have been transferred to a prison that the state had previously  
24 said was overcrowded. Covino, the third case cited, that  
25 involved a policy of random strip searches of pretrial

7a5QaguC

1 detainees, and there was no question but that the plaintiff was  
2 a pretrial detainee subject to random strip search.

3 Now, here by contrast, there is simply absolutely no  
4 way of knowing whether ICE agents will return to these  
5 plaintiffs' households, and if they do, whether they will  
6 commit allegedly unconstitutional acts. Obviously, not every  
7 ICE agent who participates in this program acts  
8 unconstitutionally. There have been far more raids than those  
9 alleged in the complaint and yet only a handful of people are  
10 complaining their rights were violated.

11 If anything, for that matter, the agents have no  
12 reason to return to these households. Having been there once  
13 and found a resident unhelpful in locating the fugitive,  
14 there's no reason to return absent some potentially new  
15 information, and we just don't know if that's ever going to  
16 come into their possession. So, in sum, there's really no  
17 nonspeculative basis to conclude that these plaintiffs will be  
18 harmed, much less irreparably harmed.

19 As to the irreparable part, of course, the usual  
20 remedy for these kinds of violations is a Bivens claim and  
21 they've made those claims. So the harm, if there was any, is  
22 certainly reparable, and I would just also point out that  
23 belying the supposedly emergency nature of this application is  
24 the fact that these raids took place eight months ago in  
25 February. The plaintiff saw no need to bring a supposedly

7a5QaguC

1 emergency application until eight months after the fact, and  
2 there is certainly no claim that the agents have returned in  
3 the interim. Of course, what this underscores is that the  
4 proper remedy is the usual remedy, and that is a Bivens claim  
5 for damages.

6 Unless the Court has any questions, I'll turn it over  
7 to my colleague, Mr. Cargo.

8 THE COURT: The plaintiffs allege that there have been  
9 new raids and that there are, therefore, additional plaintiffs,  
10 right?

11 MS. WOLFSTEIN: Yes, that's my understanding.

12 THE COURT: There's no allegation that there's  
13 anything that has occurred with the original plaintiffs.

14 MS. WOLFSTEIN: No, there isn't.

15 THE COURT: What's the government's representations  
16 with respect to the plaintiffs in this action? For example,  
17 none of the plaintiffs in this action, I take it, are subject  
18 to any final orders of removal. If an alien were subject to a  
19 final order of removal and the immigration status were at issue  
20 in the court, the government's traditional position is, of  
21 course, we won't deport this person or remove this person until  
22 the case is decided; that's our position, and we used to be --  
23 we'd say it to the District Court, and now you say it to the  
24 Court of Appeals. I assume that the government's position with  
25 respect to the individually named plaintiffs would be, first,

7a5QaguC

1 they won't be removed because if they're not alleged to be  
2 fugitives, they're not alleged to be removable aliens, and I  
3 take it the government's representation would also be that  
4 their finding would be no retaliation taken against the  
5 plaintiffs in this case because that would be wrong and  
6 certainly counterproductive.

7 MS. WOLFSTEIN: Right, your Honor, of course, a  
8 citizen is not subject to being removed. So if they are  
9 citizens, they are not subject to being removed at all. As I  
10 said, there is another program that is -- it appears to be at  
11 issue in the amended complaint, the target gang members, not  
12 all of whom are -- or perhaps most of whom -- many are of whom  
13 are not under final orders of removal but are here illegally.  
14 And, again, I don't want to say too much because we've had very  
15 limited time to delve into the facts, but in the situation of  
16 an illegal alien who is subject to an order of removal like a  
17 gang member, I think the enforcement action I understand is  
18 meant to put them into proceedings where they will proceed  
19 before an immigration judge, the BIA, the Court of Appeals.

20 But as to your specific questions, if they are not  
21 fugitives under a final order of removal, my understanding is  
22 they will not be targeted for removal, and certainly I cannot  
23 imagine that there would be any -- as you say, I can't imagine  
24 there would be any program of retaliation or any informal  
25 notion of retaliating against plaintiffs for bringing a

7a5QaguC

1 lawsuit. So I think those are not in dispute.

2 THE COURT: And you would communicate that to your  
3 client?

4 MS. WOLFSTEIN: Yes, your Honor.

5 THE COURT: All right.

6 MR. CARGO: Good afternoon, your Honor. Shane Cargo  
7 also for the government. I'd like to speak briefly about the  
8 standing issue, and then move to the scope of the order that  
9 they are seeking. As Ms. Wolfstein touched upon, Lyons is a  
10 case that's notably absent from their papers, but it's the  
11 Supreme Court case that governs this Court's jurisdiction to  
12 issue prospective injunctive relief.

13 A quick background of the facts of Lyons. The  
14 plaintiff in that case was severely injured when a police  
15 officer administered this chokehold against him. In addition  
16 to damages, he sought an injunction prohibiting the Los Angeles  
17 Police Department from ever using that technique in connection  
18 with their law enforcement activities. The Supreme Court in  
19 that case said that in order to attain standing to request  
20 prospective injunctive relief, the threat of injury must be  
21 real and immediate, not conjectural and hypothetical. In that  
22 case, notably, ten people had already died from the chokehold.  
23 The court nonetheless found that the threat of future harm was  
24 conjectural and hypothetical. That case has been followed by  
25 the Second Circuit in a couple of recent decisions including

7a5QaguC

1 the Shane case from 2004.

2 In this case the threat of harm is far more  
3 conjectural than it was in the Lyon's case. Plaintiff's  
4 hypothesize that ICE is going to go back to Mrs. Aguilar's  
5 house even though they haven't been there for seven months.  
6 They hypothesize that if those agents go to her house, they  
7 will enter without consent in violation of the Fourth  
8 Amendment. They're also hypothesizing that she won't have an  
9 adequate remedy.

10 She's already brought the Bivens suit, and she's  
11 seeking through money damages to address any harm she's  
12 suffered. That's a very different issue than the forward  
13 analysis that a court has to go through when considering  
14 whether a plaintiff has standing to seek prospective injunctive  
15 relief.

16 I'd like to actually turn to this order because it is  
17 not at all narrowly tailored to the harm that's complained of.  
18 Reading from Subsection A, it seeks an order enjoining and  
19 restraining defendants, their agents, employees, assignees, all  
20 persons acting on their behalf. The defendants, of course, are  
21 ICE, but there are more than 500 ICE agents in New York, and  
22 they are engaged in a whole panoply of law enforcement  
23 activities: Narcotics, national security, terrorism, child  
24 pornography, human trafficking. So this injunction would  
25 prohibit all of those officers from entering or searching any

7a5QaguC

1 home or seeking consent to enter any home within the  
2 jurisdiction of New York without first obtaining a judicially  
3 ordered search warrant.

4 It makes no allowance if an officer is in hot pursuit  
5 of a fugitive. It makes no allowance if somebody has probable  
6 cause to enter a home. The scope of this injunction would  
7 really bring ICE -- and as I say that's more than 500 officers  
8 -- their activities to a halt until the court can rule on the  
9 preliminary injunction itself.

10 As far as the third clause, contacting, retaliating  
11 against, arresting, prosecuting, deporting the named plaintiffs  
12 in this action, their family members, and any witnesses in  
13 raids. That clause is actually prohibited by 8 USC 1252(g),  
14 and I will give your Honor a copy of that, but that broadly  
15 prohibits any court from interfering with the Attorney  
16 General's discretion to execute removal orders.

17 If any of these plaintiffs are under removal orders,  
18 and, as my colleague said, it's too early to determine  
19 immigration status of all the plaintiffs. Many of them  
20 apparently are citizens. There's a few where they say they're  
21 of Latino origin. The complaint doesn't specify whether  
22 they're lawful, permanent residents or citizens, but if any of  
23 those are subject to removal orders, this second clause would  
24 clearly run afoul of 1252(g) which prevents a court from  
25 interfering with the Attorney General's discretion to execute



7a5QaguC

1 removal orders.

2 The third clause transferring any individual detained  
3 by ICE, that's also precluded by a separate subsection of 8 USC  
4 1252(f) which states that it's in the Attorney General's  
5 discretion where he chooses to detain aliens and, of course, he  
6 can transfer aliens to wherever there happens to be space to  
7 hold those aliens.

8 Finally, with respect to B, plaintiff's motion for  
9 expedited discovery. As my colleague mentioned, this is at  
10 heart a Bivens case, and we expect the discovery will progress  
11 along those lines and expedited discovery pursuant to Rule  
12 26(d) is clearly beyond the scope of this lawsuit. So we  
13 respectfully request that the Court deny that request as well.

14 THE COURT: What do you mean by beyond the scope of  
15 this lawsuit?

16 MR. CARGO: Well, this lawsuit really seeks to do two  
17 things: Claim one, I'm talking about the initial complaint  
18 because we haven't yet seen the amended complaint, seeks  
19 prospective relief in the form of some kind of order for the  
20 Court requiring ICE to follow certain policies and procedures.  
21 Again, the allegation here is that they have a policy and  
22 practice of, in effect, violating the constitution when they're  
23 trying to execute removal orders. We take issue, as I  
24 mentioned, with their standing and their ability to assert a  
25 claim like that in federal court.

7a5QaguC

1           Claim two is a plain old Bivens case seeking damages  
2           for the alleged constitutional violation that happened back in  
3           February of this year.

4           THE COURT: I don't follow you again as to why you say  
5           expedited discovery pursuant to 26(d) is beyond the scope of  
6           the lawsuit.

7           MR. CARGO: Well, part of the problem I'm having is  
8           that in the papers I read it's not clear what kind of discovery  
9           they are seeking. I think I heard the plaintiff's lawyer say  
10          that they wanted to see any manuals that ICE follows when it's  
11          executing its removal orders. I know that those exist, and  
12          those actually really go to the first claim in the lawsuit.

13          THE COURT: I may be wrong, but the only -- the place  
14          I saw the request for expedited discovery is in the memo of law  
15          in support of the application at page 20 where it says "the  
16          plaintiffs request only information relating to (1) ICE's  
17          policy, practices, procedures, and training relating to the  
18          conduct of home raids by ICE. (2) The facts relating to the  
19          home raids actually conducted by ICE's New York City regional  
20          office for the past ten months. (3) The names of the agents  
21          involved in the raids in the complaint and amended complaint.  
22          And (4) the names of current locations of all individuals  
23          detained by ICE in any raid conducted within the jurisdiction  
24          of the New York City regional office since September 20, 2007.

25          I'm correct, aren't I, that's the place where the --

7a5QaguC

1 addressing the plaintiff?

2 MR. MAER: Yes, your Honor. We obviously don't know  
3 exactly what records they keep. If there's a conversation,  
4 we'd obviously be happy to clarify what types of records would  
5 satisfy us, and we could prepare a document for Tuesday.

6 MR. CARGO: As I said, your Honor, we've indicated the  
7 defendants will be moving against this action for lack of  
8 standing in at least the first claim, and I don't think we  
9 should engage in discovery until the Court has ruled on a  
10 motion that will be dispositive, at least with respect to half  
11 of the case, frankly, the larger half of the case.

12 THE COURT: When do you expect to make a motion to  
13 dismiss for lack of standing at least the first claim?

14 MR. CARGO: I think it will come in the form of a  
15 cross motion and opposition to their injunction papers.

16 THE COURT: They say they don't have enough  
17 information at the moment to make their motion for preliminary  
18 injunction.

19 MR. CARGO: Well, we had contemplated making a  
20 preanswer motion. We haven't seen the second -- the amended  
21 complaint in this case. We would have made a preanswer motion  
22 in approximately seven weeks when our answer was due.

23 THE COURT: When was the original complaint filed?  
24 You had 60 days after the summons was served.

25 MR. CARGO: Yes.

7a5QaguC

1 THE COURT: And the original complaint was served.

2 MR. CARGO: It was served on the 24th, filed on the  
3 20th. At least one of the individual defendants has not yet  
4 been served.

5 MR. MAER: Your Honor, if I can respond?

6 THE COURT: Let me just finish. Anything further?

7 MR. CARGO: Unless the Court has any questions or my  
8 colleague wants to fill in, thank you.

9 THE COURT: OK. Plaintiffs?

10 MR. MAER: Thank you, your Honor. If I can speak from  
11 the table, your Honor.

12 THE COURT: Sure.

13 MR. MAER: Thank you. I don't know why -- the amended  
14 complaint was served, and I believe we have a receipt from it  
15 having been filed yesterday. It's obviously the critical  
16 document here because it sets forth the facts that we are  
17 primarily relying on.

18 THE COURT: Is it a verified complaint?

19 MR. MAER: Yes. And attached to our order to show  
20 cause are declarations.

21 THE COURT: I read the declarations attached to your  
22 order to show cause.

23 MR. MAER: I do have copies of these letters from the  
24 government from Nassau County, and I would like to hand them to  
25 the Court and to opposing counsel. They are attached to the

7a5QaguC

1 complaint because in a sense he said/she said is always a  
2 difficult type of situation to be in. Here we have the police  
3 chief of Nassau County who had a large number of agents  
4 accompanying ICE on these raids in which 190 people were  
5 arrested, again, a very small handful of what are these  
6 fugitive aliens and the police chief said, "I'm not going to  
7 allow my police officers to go out on these raids because  
8 they're in physical danger and they're completely ineffective."

9 If I could, I would like to give this to the Court and  
10 to opposing counsel, and I'm wondering maybe we should come  
11 back on Tuesday or something when the amended complaint has  
12 been properly served and have been delivered to the parties  
13 because seven of our plaintiffs were told that ICE would be  
14 coming back, the ICE agents would be coming back. These raids  
15 seemed to being targeted on the Latino community. That's why  
16 we fashioned our class definition of people living in Latino  
17 households. This is, I think, the basis for addressing the  
18 Lyons question, are these people just like everybody else  
19 subject to future harm? No. These people, many of them have  
20 been told that ICE is coming back. They're in a very narrow  
21 subset of households that will potentially have this happen.  
22 And there is a news article from yesterday.

23 THE COURT: I cannot rely on a news article.

24 MR. MAER: I understand, where a woman testified that  
25 a return raid was made on her home even though the first time

7a5QaguC

1 there was no problem. So, the likelihood of these raids  
2 occurring again to our plaintiffs, we think, is serious and  
3 addresses the concerns set out in Lyons.

4 THE COURT: When were the raids conducted with respect  
5 to the original plaintiffs?

6 MR. MAER: Starting in the winter of this year.

7 THE COURT: Winter of '06?

8 MR. MAER: 7.

9 THE COURT: Early 2007.

10 MR. MAER: I'm sorry, yes, early 2007.

11 THE COURT: Did the ICE agents return to any of the  
12 plaintiffs?

13 MR. MAER: No, they have not.

14 THE COURT: I understand your argument, and I'm  
15 perfectly happy to come back -- to have you pass up the  
16 documents, give them to the government, and have you come back  
17 on Tuesday. Meanwhile, of course, you heard my colloquy with  
18 the government with respect to the issue of whether there would  
19 be retaliation against the plaintiffs in this action, and you  
20 can certainly communicate that colloquy to the plaintiffs in  
21 this action. I take seriously the government's representations  
22 and also how unproductive it would be to attempt to retaliate  
23 against plaintiffs in the case. Of course, as you said, there  
24 has been no action taken against the plaintiffs where the raids  
25 were conducted many months ago.

7a5QaguC

1 But, in any event, I'll certainly have you back on  
2 Tuesday, read the amended complaint, as well as the other  
3 documents you've given me, and the government can do the same,  
4 and let me give you a time on Tuesday

5 MR. MAER: Thank you, your Honor.

6 THE COURT: Give me just a moment. Tuesday October 9  
7 at 3:00 p.m.

8 MR. MAER: That's good. Thank you, your Honor.

9 THE COURT: I will look forward to seeing you all  
10 then.

11 MS. WOLFSTEIN: Your Honor, just one point from the  
12 government. It just bears noting that some of the plaintiffs  
13 are Jane Doe and John Doe. So we, of course, have no idea who  
14 they are, hard -- can't make --

15 THE COURT: That's true.

16 MS. WOLFSTEIN: We can't not enforce the order.

17 THE COURT: That's absolutely right. Your  
18 representation is only with respect to the people who you know  
19 about as being plaintiffs in this case.

20 MR. MAER: We understand, your Honor.

21 THE COURT: If the plaintiffs wanted to come forward,  
22 and I'm certainly not requiring the plaintiffs to do that, and  
23 say, look, we're John Doe number one, and we want to make sure  
24 that there's no action taken against us, but I certainly didn't  
25 read your representation to mean that ICE cannot take any



7a5QaguC

1 actions against any persons because they might be John Doe, and  
2 the plaintiffs understand that, right?

3 MR. MAER: Yes, we do, your Honor.

4 MS. WOLFSTEIN: One more question. Is there anything  
5 the Court would like from the government for Tuesday's  
6 appearance?

7 THE COURT: Well, that's a very kind offer -- no. I  
8 have a memo in support of the TRO, and so I called you all in  
9 promptly, and I realize that there's been no opportunity to  
10 file a memo in response. I would appreciate a memo in response  
11 that sets forth the opposing position and cites the cases on  
12 which you are relying, and it would be most helpful to me if it  
13 were submitted by, obviously, the end of the day on Monday,  
14 late on Monday -- sometime prior to dinner on Monday, and you  
15 should assure that one way of filing it to assure that I get it  
16 is to fax it to my chambers at the fax number which you can get  
17 from my deputy and of course serve it, and you can serve it by  
18 faxing it to counsel for the plaintiffs. I'm not requiring any  
19 further papers, but I know that lawyers never want to give up  
20 an opportunity, so if the plaintiffs wanted to file reply  
21 papers, they could do it in the morning by faxing a reply to me  
22 in the same way. Mr. Fletcher will provide both sides with a  
23 fax number.

24 MS. GORDON: Thank you very much, your Honor.

25 MR. MAER: May I, your Honor? I think one production

7a5QaguC

1 by the government would be useful. We've stated that as far as  
2 we know, they do not have any clear protocols telling ICE  
3 agents what they should and should not do and how they should  
4 approach these home raids other than sort of a two paragraph  
5 summary of the totality of the circumstances, and I believe I  
6 heard reference to the fact that they may in fact have  
7 protocols governing these home raids. If they could produce  
8 those for Monday, that would obviously be very helpful so we  
9 can understand what types of directions the agents are or are  
10 not informed of.

11 THE COURT: Mr. Cargo?

12 MR. CARGO: Monday is a holiday. As of 30 minutes  
13 from now we really won't be able to get in touch with our  
14 clients until Tuesday. So I can't see any way that we will be  
15 able to pull together the policies and review them. This is an  
16 extremely complex operation, and that's one reason we object to  
17 discovery at this early stage, especially since there is a big  
18 standing issue, and we intend to move against the complaint on  
19 that basis.

20 I'm also not clear whether your Honor is interested in  
21 receiving an opposition to the TRO for an injunction itself,  
22 and I'm not clear whether the plaintiffs are planning on filing  
23 an application for a TRO with an actual set of papers in  
24 support of a PI.

25 THE COURT: The only thing that's before me now is the

7a5QaguC

1 temporary restraining order which seeks the relief that you  
2 correctly identified in the order and a request for expedited  
3 discovery, the substance of which is referred to in the  
4 memorandum, although there's no request for documents that's  
5 out there.

6 MR. CARGO: Clearly, standing is a threshold issue of  
7 the Court's jurisdiction--

8 THE COURT: Right, I understand.

9 MR. CARGO: And does your Honor expect a brief on the  
10 standing issue? That has to be part and parcel of the  
11 opposition we filed, but, again, we --

12 THE COURT: Yes, sure. I mean, anything you would  
13 like to tell me in response to the temporary restraining order,  
14 the request for temporary restraining order and request for  
15 expedited discovery, I would like to hear in papers. You've  
16 certainly raise the standing issue. You've raised some  
17 statutory restrictions on some of the requests for relief. So,  
18 I realize that there is little time to put together the  
19 responsibilities on a temporary restraining order. I'm not  
20 asking for a Supreme Court brief or anything like that. Both  
21 of you have already indicated the standards that should be set  
22 out for a temporary restraining order with respect to  
23 government action. You can tell me whatever you would like to  
24 tell me in as brief a form as you wish so that I'm in a  
25 position to decide solely the temporary restraining order.

7a5QaguC

1           As I indicated earlier to the parties, I do not have  
2 even a motion for a preliminary injunction, so you're not  
3 putting in a response to a motion for preliminary injunction.  
4 I said that this relief is somewhat unusual because usually a  
5 temporary -- well, under the rules, a temporary restraining  
6 order exists only for ten days unless extended for another ten  
7 days, and it's usually preliminary to a preliminary injunction,  
8 and I have no motion for preliminary injunction, and the  
9 plaintiff says we don't have enough information and haven't had  
10 enough information to ask yet for a preliminary injunction.

11           So, there is no motion for a preliminary injunction.  
12 You're not responding to a motion for preliminary injunction.  
13 You're responding solely to the request before me for a TRO.

14           MR. CARGO: I guess part of the problem I was having  
15 was understanding the nature of the follow-up conference at  
16 3:00.

17           THE COURT: Ah, as I understand it, the plaintiff says  
18 no one has read our amended complain. We don't know why it  
19 didn't get to the government. We don't know why it didn't get  
20 to the Court. The amended complaint is a verified complaint.  
21 It contains sworn statements which we rely upon in support of  
22 our request for a TRO. Part of what your colleague told me is  
23 we can't really address the amended complaint. We haven't seen  
24 it. So one of the things you'll want to add -- and so the  
25 plaintiff says we would rather have a decision made on the TRO

7a5QaguC

1 after everyone has looked at the amended complaint and the  
2 additional letters from Nassau County, and so I assume that --  
3 and come back. Let us come back on Tuesday. We'll argue for  
4 the TRO at that time. That's why we're having a conference on  
5 Tuesday.

6 Why are you submitting a brief? Because your  
7 colleague asked me whether that would be appropriate, and I  
8 never turn down help. Even if it's help that's offered over a  
9 holiday weekend from both sides. Again, I'm not asking for a  
10 Supreme Court brief, and you can be as short or as long as you  
11 want. You say why is this dispositive. You say there are a  
12 couple of statutes you want me to look at. Whatever it is you  
13 want me to look at in terms of the standards, etc., the kind of  
14 brief you would have given me had you gotten notice that the  
15 decision would finally be made on the TRO today after one day's  
16 notice, that's all. And I will not under the circumstances  
17 require that discovery be made at this point between now and  
18 the time I see you all on Tuesday. Any other questions?

19 MS. WOLFSTEIN: Understood. Thank you.

20 MR. MAER: I just want to correct a misstatement of  
21 mine. The amended complaint is not verified.

22 THE COURT: Ah.

23 MR. MAER: I think I represented that.

24 THE COURT: OK. Do you still want to come back on  
25 Tuesday? OK.

7a5QaguC

1 MR. MAER: Yes.

2 MS. WOLFSTEIN: Thank you, your Honor.

3 (Adjourned)

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